Supreme Court of the United States

OCTOBER TERM, 1940.

No. 584.

COMMERCIAL MOLASSES CORPORATION,

Petitioner,

vs.

NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "*T. N. No. 73*",

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

ROBERT S. ERSKINE,
CLETUS KEATING,
L. DE GROVE POTTER,
RICHARD SULLIVAN,
Counsel for Respondent

Parker Press, Inc., 72 Thames St., New York, U. S. A.

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BRIEF FOR RESPONDENT.

I. *Jurisdiction.*

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, filed pursuant to the provisions of the United States Code, Title 28, Section 347(a), on November 20th, 1940, and granted on December 16th, 1940.

II. *Opinions.*

The writ seeks to review a decree of the Circuit Court of Appeals for the Second Circuit (R. 298), which affirmed a decree dismissing petitioner's claim entered May 22nd, 1939 in the United States District Court for the Southern District of New York (R. 264).

The opinion of the District Court by Judge Leibell is not officially reported, but is unofficially reported as *T. N.*

No. 73, 1939 A. M. C. 673, and appears at pages 246-264 of the Record.

The opinion of the Circuit Court of Appeals is reported as *Commercial Molasses Corporation* v. *New York Tank Barge Corporation*, 114 F. (2d) 248, and appears at pages 291-297 of the Record.

III. *Statement of Facts.*

Respondent was the time-chartered owner of the steel tank barge *T. N. No. 73*, an oblong type of craft commonly used for harbor transportation of liquid cargoes in bulk, her interior being divided by thwartship and fore-and-aft bulkheads into two forward and two stern tanks (R. 25, 26, 29, 202, 212, 267).

Under a private contract of carriage, respondent furnished the barge to the petitioner to receive a load of molasses out of the Steamship *Athelsultan* at Pier 1, Hoboken, and transport it to petitioner's plant at Baldwin Avenue, Weehawken, New Jersey (Ex. 6, R. 230-233). The barge commenced to receive the molasses from the *Athelsultan* at about 9:05 P. M. October 23rd, 1937, and at about 1:05 A. M. on October 24th the barge sank by the stern (R. 268-270). At the time of the sinking, and previously thereto, molasses was being pumped by the *Athelsultan* into the barge's stern tanks at a rate of from three to three and a half tons per minute, thereby steadily deepening the barge by the stern at a rate of approximately one inch per minute (R. 150, 269-270, 274). That external force or influence on the trim and stability of the barge was continuing in effect when the stern went under, the *Athelsultan's* pump being stopped only after the accident had occurred (R. 269-270).

The private contract of carriage had been made by the respondent in 1928, with the predecessor company of the petitioner, Dunbar Molasses Corporation (Ex. 6, R. 230-233), and petitioner admittedly continued the contract upon taking over its predecessor's business, and the services of the *T. N. No. 73* were being furnished under that contract when this accident happened (R. 162; Petitioner's Brief, p. 3). The clause of the contract which is most directly involved in the present litigation is:

> "It is agreed that the Dunbar Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co. Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co. Inc., and/or the owners of such barges; and that neither the New York Tank Barge Co. Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected" (R. 232).*

Admittedly the petitioner did not take out any insurance on this cargo of molasses for the account of the respondent or the barge (R. 162). There was insurance on the molasses for petitioner's account; and petitioner, having collected its own insurance, is now, admittedly, prosecuting this suit on behalf of its underwriters (R. 162-163). No evidence was offered by petitioner to show that insurance, including coverage of losses due to unseaworthiness, could not have been obtained for respondent's account upon payment of the necessary premiums.

When the *T. N. No. 73*, with an experienced captain and mate aboard, went alongside of the *Athelsultan* on October

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* The trade name of your respondent, inadvertently used in the pleadings, was corrected at the trial to the proper corporate title, without objection (R. 23).

23rd, 1937 (R. 266, 268), there was on the steamship an inspector named Carpinello, who, with his assistant Lanza represented cargo interests, and whose duties in supervising the cargo included inspection and approval of the barges which were to receive the molasses from the steamship (R. 165, 167, 170, 171, 175). Carpinello, accompanied by respondent's marine superintendent, inspected the *T. N. No. 73* before she commenced to receive the molasses, and found that her tanks were dry and clean, and admitted that if he had found any evidence of leakage he would not have "passed" the barge. He advised his assistant Lanza that the barge was "All right" (R. 55, 56, 170, 175, 186, 273).

It is undisputed that, with a cargo of heavy density like molasses, a full load would be less, in volume, than the cubic capacity of the tanks, and that the customary method of determining the full load (weight) of a barge like the *T. N. No. 73*, is by observation of the proper height of the deck above the water,—freeboard. There is ordinarily no gauge to measure the flow of the cargo in gallons, and, even if there were a gauge, the cubic volume would not disclose the exact amount of weight in the absence of knowledge of the specific gravity of any given cargo. There is a considerable variation in the specific gravity of cargoes of molasses (R. 27, 28, 29, 48, 108, 183, 268).

When the *T. N. No. 73* commenced to receive the molasses from the *Athelsalton* at about 9.05 P. M. on October 23rd, the flow was first fed into the two forward tanks. The barge captain then retired to his cabin, leaving the loading in charge of the mate (R. 268, 269).

At some time which the mate did not note definitely, but which he "judged" to be "around 11.00 or 11.30" (R. 128-129), he found that the bow end of the barge was down to

a required freeboard of 23 inches under the weight of the molasses in the forward tanks, which indicated that the forward tanks had in them about half of their capacity load (R. 145). Thereupon, in accordance with customary practice, he closed the valves into the forward tanks and commenced the flow of molasses into the stern tanks, intending to bring the stern down to a freeboard of 14 inches and then complete the loading by equalizing all the tanks. Shortly before 1 A. M. on October 24th, the mate allegedly observed that the stern of the barge was down to within 1 inch of the proper limit, and started forward to shut off the flow into the stern tanks, but stopped for a conversation with someone on the deck of the steamship, which apparently diverted him and delayed his operation of the valves. As he finally turned towards the valves he felt the barge settle, or "slump" by the stern, and by the time he had gotten aft to call the captain out of the cabin, the stern was so far under water that the two men on the stern deck were waist-deep. During all of that time the cargo was continuing to flow into the stern tanks, and before the captain or mate could reach the valves and shut off the flow, the barge went down by the stern, and they were obliged to abandon her. The bow lines and hose connection held the forward end for a while but later parted and the barge went to the bottom (R. 132-141, 143-144; 268-270).

The mate said that the first "slump" of the barge by the stern felt as though a line were breaking off a cleat (R. 140). The barge had been moored alongside the *Athelsultan* by four lines running from her bow and stern corners to the ship. The lines were practically brand new, and (as stipulated at the trial) each line had a tensile strength of 22,000 pounds, so that the combined tensile strength of the two stern lines was about 20 tons (R. 147; 268). During the course of loading the barge, it was neces-

sary to slacken the mooring lines to avoid "hanging", as the barge settled and the steamship lightened in draft (R. 131). The mate's testimony indicated that he had not given proper attention to the stern lines during the last stages of the loading (R. 131, 141, 142); and it is probable that during the last few minutes before the final "slump" the tautened stern lines were holding the stern so as to create a false freeboard and disguise the excess load in the stern tanks. The final breaking or rending of the lines would have dropped the stern, which, in turn, would have caused the molasses in the tanks to run aft, thus shifting the center of gravity and accelerating the sinking of the barge by the stern (R. 148).

Whether the mate's testimony be accepted at its face value, or whether he be suspected of having fallen asleep in his cabin and afraid to admit the fact (R. 132), the proofs would seem to establish his negligence in his inattention to the final loading of the stern tanks, and his failure to shut off the flow of molasses into those tanks at the proper time.

After the sinking, and in the course of raising the sunken barge and her cargo, the salvors' diver inspected the sunken boat, and found no escape of molasses to indicate any leakages in the hull (R. 271).

After the barge had been raised and her damaged cargo discharged, she was inspected on drydock by the respondent's Port Superintendent and by five experienced surveyors, including a representative of cargo interests, who were specially endeavoring to discover the cause of the sinking. They were unable to find any indication of defective or unseaworthy condition in explanation of the sinking. The sides, ends, and bottom of the barge were sound and seaworthy, with the exception of keel plates on

either side, which had been cut and damaged by the wire slings used by the salvors to raise the sunken barge (R. 70, 115-116, 118, 121-122, 124-125, 156-158, 193, 200-203, 271). It cannot be argued that that damage could have concealed some earlier damage in the same area, because it was all in the way of the cargo tanks, where any previous leakage would have entered directly into the cargo tanks even while the barge was floating light in the water (R. 117, 125); and Carpinello's testimony squarely negatived any such condition (R. 175, 186).

The only other damage to the barge was in the destruction of her cabin and the buckling of deck plates, all of which was attributed, without dispute, to the strain of the sinking and of the raising operations (R. 121, 157).

No builder's plans of the *T. N. No. 73* were available, and the company which had constructed her had gone out of business (R. 26, 36). However, on authenticated calibration tables showing the cubic capacity of the barge's tanks, and upon careful measurements taken while the barge was on drydock, an experienced marine architect and engineer was able to determine her buoyance and displacement (R. 146-147; Ex. 4, R. 259), and on the testimony of the method of loading, and the total weight of cargo, he found that the quantity of molasses which had been pumped into the stern tanks of the barge was more than sufficient to sink her by the stern (R. 147-151). The computation which the expert had prepared before trial was based upon what he understood to be the weight of the cargo and the bow freeboard of the barge, and on that estimate his computation showed an excess weight in the stern tanks of 60 tons (R. 150-151). After the trial had been concluded, and at the request of the trial judge, the expert recast his computations upon the figures found and accepted by the court; and on that basis the excess weight pumped into the

stern tanks amounted to 101.5 tons (R. 244-246; Ex. 9, R. 235).

During the period from 1928 to the time of this accident, respondent was the time-chartered owner of the *T. N. No. 73* (R. 25-26), and had maintained her in tight, staunch, and strong condition through the daily supervision of her master or mate on board, weekly inspections by respondent's experienced marine superintendents, periodic inspections by hull insurers, and by periodic drydockings and upkeep repairs (R. 30, 31, 55, 155-156). The barge had been drydocked and inspected in May, 1937, and the minor repairs then found necessary were made, and in the ordinary course of operation no further drydocking would have been deemed necessary during the period from May to October, in the absence of any accident (R. 31, 43, 47-48; 272-273; Ex. 2, R. 228).

During the period of years from 1928, respondent had used the barge for the carriage of liquid cargoes in bulk without damage (R. 30). A cargo of beet molasses had been carried without incident a few days previously to October 23rd, 1937; and no accident or damage had occurred to the barge in the interval (R. 272-273).

During the entire trial petitioner had in court a well-known and experienced surveyor (R. 206, 212), who did not in any way criticize or dispute the computations and proofs of respondent's experts Haight and Jeffcott, and no evidence was offered by your petitioner to contradict in any respect the propriety of the method of operations under which the *T. N. No. 73* had been receiving the cargo at the time of the accident.

There is not in the record a scintilla of affirmative proof that any seawater found its way into the barge before the

sinking occurred, or that the sinking was due to unseaworthiness in any respect.

IV. *The Pleadings.*

In addition to the cargo damage, the accident allegedly caused damage to the owner of an adjacent dock because of obstruction by the sunken barge (R. 4). Accordingly, pursuing the admiralty practice and to marshal all claims in one proceeding, the respondent, as time-chartered owner of the *T. N. No. 73*, filed a petition for exoneration from or statutory limitation of liability, alleging that the sinking was due to negligence of its employees in loading the stern tanks, without its privity or knowledge (R. 2-6).

Commercial Molasses Corporation, the only claimant in the limitation proceedings, filed an answer in which it alleged that unseaworthiness was the cause of the sinking (R. 6, 8).

At the opening of the trial, on due notice to opposing counsel, a motion was made, and was allowed by the Court, to amend the petition for limitation of liability by praying that the claim of Commercial Molasses Corporation be dismissed in accordance with the provisions of the private contract of carriage, because of your petitioner's failure to procure the agreed insurance for account of respondent and its barges (R. 23-24).

V. *The Basis of the Decisions Below.*

The case was tried before Judge Leibell from October 26th to 28th, 1938. Thereafter, the case was reopened by the trial judge on his own motion, and, in accordance with his request, additional evidence was furnished at a further hearing on March 3rd, 1939 (R. 216, 244).

The trial judge denied the limitation of liability (which would have run against all possible claimants), but dismissed your petitioner's claim by reason of the terms of its contract with respondent (R. 281, 285). The basis of his decision was as follows:

(a) He stated that because the barge had sunk in smooth water, without "external contact" of any kind, there was a presumption of unseaworthiness (R. 253, 280); but, after considering all the facts and circumstances disclosed by the proofs, he was of the opinion that "The best that can be said of the state of the record is that the cause of the accident has been left in doubt" (R. 258, 280).

(b) In that situation, he concluded that there was a presumption of unseaworthiness *in law*, which your respondent had not rebutted, and he denied limitation of liability on the rule of "personal contract" (R. 258, 280-281).

(c) He concluded, however, that your petitioner's claim was barred because the insurance clause of the contract was plainly intended to include losses due to unseaworthiness, and that the clause was valid in a contract of private carriage (R. 258-264; 280-285).

Commercial Molasses Corporation appealed to the Circuit Court of Appeals for the Second Circuit only from that portion of the final decree which dismissed its claim (R. 286). New York Tank Barge Corporation, by cross-assignments of error, asked a review of the denial of limitation of liability (R. 287).

The Circuit Court of Appeals, accepting the finding of the trial judge that the cause of the sinking had been left in doubt (R. 293), ruled that, as the contract was one of private carriage and the relationship between the parties was merely that of bailor and bailee, Commercial Molasses Corporation had failed to sustain its burden of proving

the alleged unseaworthiness of the barge as the cause of the sinking; and accordingly affirmed the decree below (R. 296, 297). The Circuit Court of Appeals emphasized the point that an inference of unseaworthiness is a "rational" inference, depending upon the facts; and that, when the trial judge found the cause of the sinking "in doubt", he did not infer unseaworthiness, in fact (R. 297).

VI. *The Questions Presented.*

Petitioner's appeal relates solely to the dismissal of its claim, and that turns upon the basic question whether the claim is barred under the specific provisions of the private contract of carriage because of petitioner's failure to procure the promised insurance.

Petitioner's case before this Court is in effect as though petitioner had originally libelled the barge and respondent in a direct suit for the loss of or damage to the cargo of molasses, and respondent had admitted that the sinking was due to the negligence of its employees in filling the stern tanks and had thereupon rested its defense upon the provisions of the private contract and petitioner's admitted failure to procure the promised insurance.

Petitioner's argument that the insurance clause of the contract did not cover losses due to unseaworthiness is contrary to the language of the agreement, and finds no support in the surrounding circumstances. In an attempt to bolster that argument, petitioner now suggests that the clause of the contract was merely intended to give to respondent the benefit of any insurance which petitioner carried for itself (Petitioner's Brief, pp. 44-45). But this was not a "benefit of insurance" clause. It was an agreement to procure insurance directly for the account of respondent and the barges,—which had nothing to do with petitioner's own insurance.

As to the burden of proving unseaworthiness, petitioner's brief repeatedly misstates the "factual" basis of an inference of unseaworthiness and ignores the point that when the trial judge found that the "record" left the cause of the sinking in doubt, he was unable to infer as a "fact" that unseaworthiness was the cause, with the result that unseaworthiness was not proven either affirmatively or by inference.

Petitioner further confuses the issues involved by lengthy and numerous quotations from cases which relate to the liability and burden of proof of common carriers who seek to escape responsibility for cargo damage under bill of lading, or statutory, exemptions. The distinction was referred to by the Circuit Court of Appeals (R. 296-297).

FIRST POINT.

THE DISTRICT COURT RIGHTLY HELD THAT PETITIONER'S CLAIM IS BARRED BY THE TEPMS OF THE INSURANCE CLAUSE OF THE PRIVATE CONTRACT OF CARRIAGE.

The lower courts held (R. 281: R. 296), and the petitioner does not dispute, that the contract herein was a contract of private carriage (admitted at page 27 of Appellant's brief).

Producers Transp. Co. v. *Railroad Comm.*, 251 U. S. 228;
The Wildenfels, 161 Fed. 864, 866;
The C. R. Sheffer, 249 Fed. 600, 601;
Gerhard v. *Cattaraugus Co.*, 241 N. Y. 413;
The G. R. Crowe, 294 Fed. 506;
The Fri, 154 Fed. 333;
The Nat Sutton, 62 F. (2d) 787;
Koppers v. *McWilliams Blue Line*, 18 F. Supp. 992; aff'd 89 F. (2d) 865.

A private carrier is not an insurer, as a common carrier is. He is merely a bailee, and is liable only for negligence, as in any ordinary bailment.

Southern Ry. v. *Prescott*, 240 U. S. 632, 640;
The C. R. Sheffer, 249 Fed. 600, 601;
The Wildenfels, 161 Fed. 864, 866;
Kohlsaat v. *Parkersburg etc. Co.*, 266 Fed. 283;
Alpine Forwarding Co. v. *Penn. R. R. Co.*, 60 F. (2d) 734;
Gerhard v. *Cattaraugus Co.*, 241 N. Y. 413;
Lancashire Shipping Co. v. *Morse D. D. Co.*, 43 F. (2d) 750; aff'd 48 F. (2d) 1077;
Federal Ins. Co. v. *Herreshoff*, 6 F. Supp. 827;
United States v. *Todd Engineering etc. Co.*, 53 F. (2d) 1025.

Inasmuch as the reasons of public policy which apply to a common carrier do not apply to a private carrier, the latter is free to contract on such terms as he may arrange with the shipper, and is therefore free to contract that he shall not be liable, even for negligence.

Santa Fe Ry. v. *Grant Bros.*, 228 U. S. 177, 185, 188;
The G. R. Crowe, 287 Fed. 426, aff'd 294 Fed. 506;
Koppers v. *McWilliams Blue Line*, 89 F. (2d) 865.

Petitioner's claim was dismissed in the District Court, in accordance with the plain terms of the contract of private carriage, and in accordance with the stipulation therein, for petitioner's failure to insure the cargo for respondent's account. As the parties had complete free-

dom of contract, their agreement as to the insurance was entirely proper and valid. The agreement was:

> "It is agreed that the * * * Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co. Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co. Inc., and/or the owners of such barges; and that neither the New York Tank Barge Co. Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected" (R. 232).

In spite of petitioner's widespread theories, the plain fact is that this clause meant exactly what it said,—that, without any exception, the cargo would be insured for respondent's account, and that, on any failure to procure the said insurance, respondent should not be liable. The language and the surrounding circumstances of the contract do not support petitioner's argument that the Court should read into the insurance clause an intent of the parties to exclude insurance on losses due to unseaworthiness. Ordinary Marine policies of this character cover losses due to unseaworthiness.

> *Hanover Fire Ins. Co.* v. *Merchants Transp. Co.*, 15 F. (2d) 946;
> *Sorenson* v. *Boston Ins. Co.*, 20 F. (2d) 640.

In lieu of an implied warranty of seaworthiness of the barges to be used in the carriage of petitioner's molasses under the contract, respondent expressly undertook to maintain the boats in tight, staunch, and strong condition, and fit for the molasses (R. 232). Your respondent does not deny that undertaking. Respondent does not question the established law as to expressed or implied warranties of seaworthiness (Petitioner's brief, pp. 9-12). But there is no law, and petitioner does not suggest any, to prevent

a vessel owner from insuring against the possible consequences of the warranty. *Hanover Fire Ins. Co.* v. *Merchants' Transp. Co.*, 15 F. (2d) 946, 948. The question here is merely whether the Court should assume that the insurance which was to be furnished by petitioner for respondent's account was to be something less than the agreement plainly provided.

The respondent's undertaking to maintain the boats related not only to the boats which it owned but also to the boats which it might operate under charter. Respondent, as charterer of any boat, might normally have passed on to the owner of that boat the responsibility for any unseaworthiness, but, nevertheless, undertook the responsibility, so far as petitioner was concerned, in the performance of this private contract of carriage.

It is a reasonable inference that respondent, when considering insurance of its possible liabilities to petitioner, as they might arise in the performance of the contract, wanted insurance against losses due to unseaworthiness as much as other causes, particularly because of respondent's undertaking to maintain its chartered boats as well as its own boats. It is not open to question that respondent itself could have procured that inclusive insurance at its own expense, and could have included the cost thereof in the freight rates quoted to petitioner.

Great Lakes Corp. v. *S. S. Co.*, 301 U. S. 646;
Sorenson v. *Boston Ins. Co.*, 20 F. (2d) 640.
Hanover Fire Ins. Co. v. *Merchants Transp. Co.*,
15 Fed. (2d) 946.

Inasmuch as the contract was one of private carriage and the parties were free to contract as they saw fit, there was nothing to prohibit the arrangement between them that the insurance which respondent might have procured for itself would be procured for respondent's account by the

petitioner, thus placing the expense thereof upon the petitioner. That was the plain intent of the insurance clause in the contract. It is a reasonable inference that that arrangement was reflected by a lower freight rate,—as the trial judge commented (R. 282-283).

In such a situation, there is no logical basis for the petitioner's contention (particularly in the absence of any direct testimony to support it), that the insurance clause of the contract was intended to relate only to damage or losses resulting from causes other than unseaworthiness. There is nothing in the language of the clause to support the contention. To the contrary, the words "any loss", in the concluding phrase, plainly indicated that the parties understood the agreement to cover all causes of loss. Petitioner's argument not only disregards the language of the clause itself, but also ignores the plain and logical situation which arose when petitioner undertook to procure for the respondent the insurance which respondent might have procured for itself.

It is on that basis that the trial judge, overruling the petitioner's argument, concluded that the intent of the insurance clause of the contract was to cover all losses, including those due to unseaworthiness.

> "Claimant* contends that because the contract contains an express warranty of seaworthiness, the insurance clause was not intended to cover losses due to unseaworthiness. The warranty was made to the claimant; it would not ordinarily be made to an insurer if the petitioner were obtaining a policy on the cargoes to be carried in its barges. Petitioner could have obtained insurance to cover cargo losses due to unseaworthiness. There is no implied warranty of seaworthiness in a legal liability, or protection and indemnity, policy, obtained by a ship or

* The present petitioner was the claimant in the District Court, and the present respondent was the petitioner.

lighter owner on the cargoes to be carried in its vessels; such a policy insures damage to cargoes due to the unseaworthiness of the vessels. See, Sorenson v. Boston Insurance Co. 20 F(2d) 640 * * *" (R. 281).

"To add by implication to the broad and general language of the insurance clause, an exception of losses resulting from the unseaworthiness of the barge, would leave the barge owner without insurance that he otherwise might have obtained—a result that would be manifestly unfair. The barge owner had the right to assume that the insurance clause in the contract of carriage meant just what it said, without any implied exceptions * * *" (R. 284).

"As we have seen, the petitioner could have taken out insurance on its own account which would cover cargo losses due to unseaworthiness. In fact, having warranted the seaworthiness of the barges to the claimant, it would seem that insurance covering such a contingency would be the kind most desired by the petitioner. I am of the opinion the aforementioned insurance clause of the contract of carriage was intended to cover any losses the carrier (petitioner) could have insured against, including cargo losses due to unseaworthiness. Since claimant (or its predecessor) contracted to obtain such insurance and did not do so, I am of the opinion that the petitioner should be granted exoneration from liability." (R. 284.)

Petitioner argues that unless unseaworthiness were excluded, the insurance clause would nullify the respondent's warranty of seaworthiness. That argument has no basis in either fact or law. Insurance presupposes a liability for which the insurance is to furnish protection. It does not nullify or remove the obligation on which the liability may arise.

If petitioner had procured the promised insurance for the respondent's account protecting respondent against any liability for loss or damage to the cargo, it is self-evident that the said insurance could not have attached unless petitioner claimed and established a liability of respondent.

Consequently, the phrase in the insurance clause which provided that respondent should not be liable for any loss in respect of which insurance "has been" effected could not have meant (as petitioner argues), that no claim could be presented against respondent if the insurance were procured. Such an interpretation would reduce the whole clause to a nullity. The plain meaning of the phrase referred to was to insist that the insurance be procured by petitioner for respondent's account in such form that the underwriters, upon payment of loss, would not be permitted to pass the liability on to respondent and its barges by right of subrogation,—as petitioner's underwriters are now attempting to do (R. 164). Assuming that that meant payment of an extra premium by petitioner, as petitioner's brief argues (p. 45), it was presumably equalized by a lower freight rate.

Thus, the insurance in no way modified the warranty of seaworthiness, but was intended to protect the respondent against any liability which might arise by reason of the warranty. The trial judge so held:

> "Claimant argues that the result of this interpretation of the insurance clause would be to nullify the express warranty of seaworthiness contained in the same contract of carriage. I do not see it that way. If the charterer,"—(claimant?)—"the claimant herein, had lived up to its obligations under the insurance clause, it would not thereby lose the benefit of the personal warranty of seaworthiness. That warranty would still be in effect and in the event of a loss to the cargo, resulting from the unseaworthi-

> ness of the barge, claimant could hold both the petitioner and the barge. * * * If the insurance company reimbursed petitioner under the policy claimant was required to obtain for the account of the petitioner, that would not be money out of claimant's pocket; and of course, the insurer would have no right of subrogation against claimant. * * * The premium on the policy is all that the insurance would have cost the claimant, and even the premium would indirectly be borne by petitioner in the freight rate provided in the contract of carriage, which undoubtedly would have been higher if petitioner had to procure its own insurance for cargo losses" (R. 283-284).*

At pages 50-51 of its brief, petitioner states that it would be "against public policy" to require petitioner to provide insurance to protect respondent against a breach of warranty of seaworthiness. But it is clear from the authorities already cited herein that no question of public policy is involved, because this was a contract of private carriage. Many of the cases cited by petitioner in its Point VI comment on the fact that a private carrier might, by contract, eliminate the warranty of seaworthiness. *Cullen Fuel Co.* v. *W. E. Hedger, Inc.*, 290 U. S. 82, 88; *The Turret Crown*, 297 Fed. 766, 775; *The Framlington Court*, 69 F. (2d) 300, 303. If the warranty itself might be nullified by contract, there is no public policy to forbid a contract for insurance against the consequences of the warranty.

The whole of petitioner's POINT VI (pp. 40-53) is an attempt to escape the finding of the trial judge that the

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* The Circuit Court of Appeals, in its opinion, said that the trial judge had concluded that the insurance clause relieved the Barge Company of the covenant of seaworthiness (R. 293). That would seem to be clearly a mistaken interpretation of the trial judge's conclusion.

insurance clause contemplated direct insurance for respondent's account, such as respondent itself might have taken out. The experienced counsel for petitioner know well that such insurance would have covered respondent for cargo losses due to unseaworthiness, as shown in the cases cited above.

Petitioner's argument is wrongly based on the contention that the agreement here was for petitioner to give the benefit of its insurance to the respondent. On that basis, petitioner argues that it could not have undertaken to void its own underwriters' rights, by subrogation, against respondent, with respect to unseaworthiness (Petitioner's brief, pp. 44-45).

But the clause here was not a "benefit of insurance clause." It said nothing about petitioner's insurance. Respondent did not care whether petitioner carried any insurance. Respondent was concerned only in its own direct insurance, and it was such insurance that petitioner agreed to procure for respondent's account. The trial judge so held (R. 282).

Similarly, the lengthy quotation from *Nelson Line, Ltd. v. James Nelson & Sons, Ltd.* (Petitioner's brief, pp. 47-48), has no application here, and merely confuses the issue, because in that case the contract was to release the shipowner from damage "which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance." That agreement related solely to the cargo owner's insurance, which is something quite different from insurance for the direct account of the vessel owner.

In the present case, the concluding words of the insurance clause were plainly intended to bar claims against the respondent for which the agreed insurance could have been effected,—i. e., the direct insurance for respondent's account. The trial judge so found (R. 283).

Again, at page 52 of its brief, petitioner seeks to argue that it had agreed only to procure "cargo insurance",—i. e., the insurance which is available to a cargo owner. But the insurance clause of the contract did not so state. The agreement was to insure the cargo for respondent's account, which could only mean the type of insurance which would protect the respondent as carrier.

The authorities cited by petitioner in its Point VI have no bearing upon the insurance clause involved here, and no authority is shown for the argument that the clause did not mean exactly what the trial judge concluded.

On pages 40-45 of petitioner's brief, there is a lengthy discussion of the original rule under which marine underwriters did not insure losses due to unseaworthiness, but, as petitioner's experienced counsel know well, marine underwriters have long since offered, both to cargo-owner and shipowner, insurance in such form as to protect the insured even when the loss is due to unseaworthiness, as shown by the petitioner's policy herein (R. 238), and in the cases of *Great Lakes Corporation* v. *Steamship Company*, 301 U. S. 646, and *Sorenson* v. *Boston Insurance Co.*, 20 F. (2) 640. Petitioner's entire discussion of this question of insurance is misleading, because of its unwarranted attempt to convey to the Court the impression (unsupported by any proofs) that the meaning of the insurance clause herein as defined and found by the trial judge would not be consistent with the forms of marine insurance which are now in everyday use.

The cases of *Nelson Line Ltd. etc., The Titania, The Hadji, The Egypt*, and *The Anna*, (Petitioner's brief, pp. 48, 50), involved bill of lading agreements to relieve the carrier from liability for losses capable of being insured

by the shipper for his own account. Other cases, such as *Luckenbach* v. *W. J. McCahan*, *Sanbern* v. *Wright & Cobb*, and *The Turret Crown*, (Petitioner's brief, pp. 44, 48, 52), involved bill of lading clauses giving to the carrier the benefit of any insurance which the shipper himself carried. Such agreements were quite different from the petitioner's agreement herein to provide insurance for respondent's account. Moreover, most of those cases related to common carriers, and reasons of public policy affected the construction given to the bill of lading agreements.

Throughout the entire argument on this point, the petitioner's good faith is subject to suspicion because of the admitted fact that it did not procure any insurance for the respondent's account, and failed to offer the slightest excuse for that breach of its agreement. And its good faith is further open to suspicion by reason of the concluding statements on pages 52-53 of its brief, where it tries to suggest that it should be relieved from the breach of contract on the theory that respondent had procured its own insurance. Even if the assumed fact were true, it would offer to petitioner no defense for its own breach. But there is no proof or admission in the case that this cargo of molasses was insured by respondent. The *T. N. No. 73* was used to carry for other parties besides petitioner, and the fact that she was "entered with" an insurance company for cargo losses in no way admitted that she was insured on petitioner's cargoes of molasses.

For the foregoing reasons, respondent submits that the trial judge rightly dismissed your petitioner's claim under the terms of the contract, irrespective of the proof of unseaworthiness of the barge; and that, as the parties to this contract of private carriage had complete freedom of contract, petitioner cannot now seek to modify the plain terms

of its agreement. As this Court stated in *Santa Fe Ry.* v. *Grant Bros.*, 228 U. S. 177, at page 188:

> "The parties then were free to make their own bargain as to this transportation and the liability which should attach to it. There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made."

SECOND POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS ON THE BURDEN OF PROOF IS IN ACCORD, AND NOT IN CONFLICT, WITH ESTABLISHED LAW.

On pages 7, 16, 29 and 32-33 of its brief, petitioner's characterizations of the decision of the Circuit Court of Appeals are grossly inaccurate, and disclose petitioner's lack of candor in its argument on this point.

Your respondent has not sought to dispute the law as to an owner's warranty of the seaworthiness of his vessel, and neither of the lower courts has departed in any way from that law. The warranty itself and the burden of proving a breach thereof are two different things.

As between bailor and bailee, in a case of private carriage, the bailor has the burden of proof, which remains on the bailor throughout. The failure of the bailee to return the goods may place upon him the burden of going forward with an explanation, but if he shows that his failure to return was due to some disaster such as the sinking of the

T. N. No. 73, the burden still remains on the bailor to prove that the disaster occurred through the bailee's negligence

In the case of *Southern Ry.* v. *Prescott*, 240 U. S. 632, at page 640, this Court said:

> "It was explicitly provided that in case the property was not removed within a specified time it should be kept subject to liability "as warehouseman only." The Railroad Company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a *prima facie* case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence."

In *Kohlsaat* v. *Parkersburg*, 266 Fed. 283, at page 285, the Court said:

> "A bailee for hire is not an insurer of the property placed in his possession, and cannot be held to answer if it be lost or damaged without his fault.*** Hence the essential element of a bailor's cause of action, the fact to be established by him, is negligence on the part of the bailee. On that issue the burden of proof rests all the while on the plaintiff, and at no stage of the trial can it be passed over to the defendant."

In *Steamship Co.* v. *Norden*, 6 F. (2d) 883, at page 887, the Court said:

> "In other words, if there is no preponderance of evidence, and the matter remains in doubt after full

> disclosure on the part of the carrier, the loss falls upon the bailor for the reason that he has failed to sustain the burden of proof."

To the same effect are:

> *Robert A. Munroe Co.* v. *Chesapeake Lighterage & Towing Co. Inc.*, 283 Fed. 526, 529;
> *Delaware Dredging Co.* v. *Graham*, 43 F. (2d) 852, 854.

In considering the application of the rule to the present case, it must be emphasized that respondent, as bailee, did not seek to deny negligence, but offered evidence that the sinking was due to its employees' negligence in overfilling the stern tanks.

The issue of unseaworthiness was raised by petitioner because it could not recover damages unless that specific negligence were the cause of the sinking. Respondent (petitioner below) obviously had no privity or knowledge of any negligence of its employees in overfilling the stern tanks (R. 89), and would have been entitled to limit liability with respect thereto, *The George W. Pratt*, 76 F. (2d) 902; and petitioner could not have argued that the insurance clause of the contract was not intended to cover loss or damage from such cause. Petitioner could not hope to defeat limitation of liability or offer its present argument in excuse of its breach of the contract unless unseaworthiness were the cause of the sinking. Petitioner recognized that situation by pleading specifically that the barge sank by reason of unseaworthiness (R. 8, 14).

Thus, in addition to its burden of proof under the general rule, petitioner, as bailor, had the burden of proving the specific negligence on which it sought to recover,—unseaworthiness. A party who claims damage by reason

of some specific negligence has the burden of proving it and also that it was the cause of the damage. *Clark* v. *Tug Bear*, 11 F. (2d) 607, aff'd without opinion, 11 F. (2d) 608; *Eclipse Lighterage & Transp. Co.* v. *Cornell Steamboat Co.*, 242 Fed. 927; *The Asbury Park*, 147 Fed. 194.

Petitioner did not offer any affirmative proof that seawater entered the *T. N. No. 73* before the sinking or that the sinking was due to unseaworthiness in any respect,—in spite of the fact that representatives of cargo inspected the barge before loading, were present during the loading, were present when the barge was raised after the accident, and inspected her again on drydock (R. 165, 175, 190, 193). Petitioner rested its case solely on an assertion that the facts and circumstances of the sinking raised a "presumption" of unseaworthiness.

As the Circuit Court of Appeals commented (R. 297), the so-called "presumption" of unseaworthiness is not a true presumption,—such as this Court considered in *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285. It is merely a "rational inference" which arises, if at all, only upon the facts of the case. It must be based upon the evidence and the weight thereof.

In *Lindsay* v. *Klein*, [1911] A. C. 194, Lord Shaw, after stating that "the onus of proving unseaworthiness is upon those who allege it", outlined the nature of facts which might support the inference of unseaworthiness, and took pains to define the inference as a finding of fact to be drawn from all the evidence.

In the course of his opinion he said:

> "My Lords, in view of the manner in which the evidence in this case has been regarded in the Court below, I think it right to give the distinction between the proposition in law that those alleging unsea-

worthiness have the burden of proof of that, and the presumptions arising on facts" (1911 A. C. 204).

In *Pickup* v. *Thames Insurance Co.*, 3 Q. B. D. 594, the judges of Queens Bench Division and of the Court of Appeals were in agreement that a new trial should be ordered because the trial judge had wrongly instructed the jury that the breakdown of the vessel and her return to port within a certain time after sailing raised a presumption of unseaworthiness in law, and cast upon the owner of the vessel the onus of proving seaworthiness. The judges in both of the higher courts went to some length in pointing out that the so-called presumption did not arise *in law* from the mere time within which the vessel returned but was an inference to be drawn from all the facts and circumstances, and that the burden of proof did not shift, so that the party alleging unseaworthiness had failed to prove it if all of the facts and circumstances left the proofs evenly balanced. In the opinion in that case Cockburn, C. J., said:

> "If a vessel very shortly after leaving port founders, or becomes unable to prosecute her voyage, in the absence of any external circumstances to account for such disaster or inability the irresistible inference arises, that her misfortune has been due to inherent defects existing at the time at which the risk attached. But this is not by reason of any legal presumption or shifting of the burden of proof, but simply as a matter of reason and common sense brought to bear upon the question as one of fact, inasmuch as in the absence of every other possible cause the only conclusion, which can be arrived at, is that inherent unseaworthiness must have occasioned the result. * * * It is from the entire absence of any other cause than inherent unseaworthiness that the probative value of such a combination of circumstances is derived. Time can enter to a very limited

extent only, if it enters at all, into the question as a factor in leading to the result. It certainly cannot be said of itself and without more, to give rise to any new presumption of law, or as a matter of law to shift the onus of proof from the party on which the law has cast it." 3 Q. B. D. 597-598.

In the same case Lord Cotton said:

"In my opinion the question of time is a question of fact for the jury, and it is for them to say, judging from all the circumstances, whether they are satisfied that the loss was occasioned by her defective condition on starting on her voyage. The direction of Field, J., I think induced the jury to believe the defendants were relieved from proving their plea of unseaworthiness, and that it was for the plaintiff to shew seaworthiness at the commencement of the risk." 3 Q. B. D. 602.

Lord Thesiger said:

"But even in this point of view it seems to me that the learned judge misdirected the jury, and that there was nothing to shew or to justify him in saying that the burden of proof, as a matter of fact, had shifted, because at the very same time that it was proved that a short time had elapsed since the vessel had started, it was also proved that there was weather which might possibly account for the loss which took place. * * *

"If their minds were in that state of equal balance, it follows that is just the occasion when the learned judge must necessarily be most accurate in the language, which he uses to the jury on the point which they discuss with him." 3 Q. B. D. 604, 605.

In both *Lindsay* v. *Klein* and *Pickup* v. *Thames Ins. Co.* the courts referred to an earlier statement in *Watson*

v. *Clark*, 1 Dow. 336, 348, in which an inference of unseaworthiness was loosely defined as a presumption in law which shifted the burden of proof; and in the two later cases the courts took pains to show that the inference was one of fact and that the burden of proof did not shift. *Watson* v. *Clark* was overruled "so far as the House of Lords can ever be said to overrule its own decisions",—as the Circuit Court of Appeals stated herein (R. 294-295).

In *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co. Ltd.*, [1901] A. C. 362 (Petitioner's brief, pp. 26-27), in which insurers sought to defend on an alleged inference of unseaworthiness, Lord Lindley said, at page 366:

> "But if, as in this case, other facts material to the inquiry as to the seaworthiness of the ship are proved, those facts must also be considered; and they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warrants the conclusion that the ship was unseaworthy when she sailed, such unseaworthiness cannot be properly treated as established. * * *"

This Court has indicated the "factual" character of an inference of this type, in *Chesapeake & Ohio Ry. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, 422, 423, by ruling that, in a case at common law, it would be for the jury to determine from all the evidence whether the negligence of the bailee should be inferred.

In *The Transit*, 250 Fed. 71, at page 72, the Court said:

> "Such a presumption necessarily arises and alone will sustain recovery in a case where a vessel sinks from an unknown cause under circumstances where she had been subjected to no external peril,

> and where nothing but her unseaworthiness can explain the accident. In other words, the presumption of unseaworthiness arises where the only inference in the circumstances is that of unseaworthiness. * * * As the circumstances attending the sinking of the "Transit" do not exclude all inferable causes except that of unseaworthiness, but, on the contrary, very plausibly suggest another cause, the presumption does not exist."

In *The City of Camden*, 292 Fed. 93, at page 96, the Court said:

> "From this action her unseaworthiness is presumed, * * * where nothing but her unseaworthiness, as in this case, can explain the accident."

In *The Wm. I. McIlroy*, 37 F. (2d) 909, at page 910, the Court said:

> "She was examined by her owner only two weeks before the sinking. At that time she was in good condition. He examined her forward, stern, and sides. She had been carrying cargo right along and there never had been any claim for loss of cargo. The sinking, therefore, could not be a basis for an inference of unseaworthiness.
>
> Thus the burden of going on with the proof of negligence shifted back to the libelant. The libelant proved nothing."

A similar analysis of the nature and basis of the inference was stated in *Oregon Round Lumber Co.* v. *Portland etc. S. S. Co.*, 162 Fed. 912, at page 921.

The foregoing authorities show that in the present case the Circuit Court of Appeals has not departed from but has adhered to the established law, and that petitioner's devious attempts to convey a contrary impression lay the petitioner's good faith open to serious suspicion.

In the present case there was much uncontradicted evidence that the barge had been maintained in sound condition, that she was found to be in sound condition immediately before taking this cargo, and that even after the accident no condition of unseaworthiness was discovered to explain the sinking. It was undisputed that at the time of the sinking the barge was being subjected to an external force,—the rapid flow of molasses into her stern tanks, which was steadily deepening her by the stern, as though being pressed down by a giant jack, which would sink her by the stern if not stopped seasonably. There was also expert evidence that the quantity of molasses pumped into the stern tanks would have sunk her by the stern.

When the trial judge concluded that such a "record" left the cause of the sinking "in doubt", it was the equivalent of saying that the surrounding facts and circumstances did not justify an inference, in fact, that unseaworthiness was the cause. He then erred in holding that there was a presumption of unseaworthiness *in law*. The net result was that petitioner, having the burden of proving unseaworthiness, failed to prove it either by affirmative evidence or by an inference based on the known facts.

The more outstanding errors in petitioner's argument are as follows:

Misstatement of the basis of inference: Throughout its brief, petitioner seizes on and repeats the statement of the trial judge that absence of external "contact" would in itself raise an inference of unseaworthiness. The authorities cited above show the error in that statement. There may be external forces or perils, other than "contacts", which would negative unseaworthiness; and the inference of unseaworthiness does not rest upon any such limited rule of thumb as the trial judge stated, and petitioner now repeats. It arises only when all the known facts offer no

other possible explanation than the inference of unseaworthiness.

The external force which was affecting the *T. N. No. 73*,—the filling of the stern tanks,—was proven without any dispute.

"Adequate" does not mean "Conclusive": Petitioner persists in its statements that no "adequate" explanation other than unseaworthiness was offered by the proofs herein, because the trial judge refused to find that the overfilling of the stern tanks was, in fact, the cause of the sinking. An illustration of that argument is found on page 27 of Petitioner's brief, in the italics of Lord Lindley's opinion and the ensuing paragraph of the brief. But Lord Lindley's language plainly shows that the inference may be negatived by facts which, without conclusively proving an alternative explanation, are sufficient to "balance" the evidence. In other words, if the known facts offer two possible explanations between which the court cannot decide, one is quite as "adequate" as the other, and neither is conclusive. There is then no inference of unseaworthiness.

The sinking by reason of the steady and uncontrolled filling of the stern tanks was an adequate explanation as an alternative to unseaworthiness. There was undisputed proof of the existence of that external force to account for the sinking. In *Work* v. *Leathers*, 97 U. S. 379, 380 (Petitioner's brief, p. 12), this Court referred to a defect developing without any "apparent" cause.—it did not say "conclusive" cause.

Petitioner ignores the absence of affirmative proofs from which unseaworthiness might be inferred: This is well shown in the following words, quoted from the caption of Point V (Petitioner's brief, p. 36).

> "After it has been shown that a vessel leaks from some unknown cause while loading, or shortly after the voyage begins, a *prima facie* case of unseaworthiness is made out."

Petitioner thus admits its burden of proof, and at the same time indicates its failure, because it did not offer a scintilla of evidence that the barge leaked before or after the loading commenced.

In the *Edwin I. Morrison*, 153 U. S. 199 (Petitioner's brief, p. 36), it was proven that seawater found its way into the vessel because of the breakage or dislodgment of the cover of a sounding pipe. In the present case there is no proof that any part of the hull or equipment of the *T. N. No. 73* gave way, or that any seawater found its way into her before she sank.

Similarly, in practically all of the fifty or more cases cited in petitioner's brief on pages 12-39, there was affirmative proof of some breakdown of machinery or equipment of the vessel, or affirmative proof of failure to make proper use of the vessel's equipment in the care of the cargo, or affirmative proof of leakage or intake of water, so as to damage the cargo or cause the vessel to founder. Those affirmative proofs of defective conditions were facts on which the courts inferred unseaworthiness, in the absence of proofs of any external forces, circumstances, or perils which might have accounted for the conditions.

In the case at bar, there is not an iota of proof that any part of the hull or equipment of the *T. N. No. 73* gave way or broke down or that any seawater entered the vessel before she sank, or that she was defective in any respect.

In *The Calvert*, 51 F. (2d) 494, and *Cullen No. 32*, 62 F. (2nd) 68, and *The Jungshoved*, 296 Fed. 733, the capsizing, careening, or sinking could have occurred only through the intake of seawater, as the Courts found; and such intake of water, in the absence of any explanation, led to an inference of unseaworthiness. In the case at bar, petitioner asked the Court to assume that the *T. N. No. 73* must have sunk by filling with seawater and to infer that such filling was due to unseaworthiness. But here there is no reason for such an assumption, because, the undisputed fact is that a fluid heavier than water,—molasses,—was pouring into the barge in such manner as to offer just as reasonable an explanation of the filling and sinking as the unproven assumption of leakage might offer.

Petitioner confuses the issues involved herein by indiscriminate and improper references to the rule peculiar to common carriers.

The obligation of furnishing a seaworthy vessel, and the burden of proving a breach of that obligation, are two entirely different things.

The burden of proving unseaworthiness is always on the party alleging it, as Lord Shaw stated in *Lindsay* v. *Klein*, [1911] A. C. 194, 211. There is no authority for the contrary statement, as it appears in the caption of petitioner's Point IV (Petitioner's Brief, p. 29). This confusion arises from what would seem to be the deliberate failure of petitioner to point out the reason for the rule which is peculiar to the law of common carriers.

A common carrier is an insurer. By reason of that fact, he has always had the burden of proving that the cause of the loss was within one of the few exceptions granted him by common law or by later statutory provisions. He cannot bring himself within an exception without estab-

lishing seaworthiness, or due diligence to render seaworthy, as a condition precedent. He must eliminate any doubt, in order to prove the "excuse" which the law affords him. Thus, in petitioner's brief, there are many references and quotations which seem to support petitioner's erroneous statement of the burden of proof, but which actually relate only to the burden which rests on a common carrier as a condition precedent to his relief. *The Wildcroft*, 201 U. S. 378, 388; *The Southwark*, 191 U. S. 1, 13, 16; *May* v. *Hamburg*, 290 U. S. 333, 346.

THIRD POINT.

The explanation of the sinking.

Respondent believes that the trial judge, in considering the questions of inference and burden of proof, erred with respect to the following points.

He erred in concluding that proof of an external "contact" would be necessary to negative an inference of unseaworthiness. Plainly, there are external forces, circumstances, or perils, other than "contacts", which can explain the sinking of a seaworthy vessel. By reason of his error in limiting himself to an external "contact", the trial judge failed to give proper weight to the uncontradicted fact that the *T. N. No. 73* was being submitted to an external force,—the rapid flow of molasses into her stern tanks,—which could have accounted for the sinking.

In the absence of any affirmative proof of a breakdown or defective condition of the hull, or of the intake of water previously to the sinking, the trial judge overlooked the complete lack of support for an inference that the barge sank through leaking and filling with water. The undis-

puted proof was that the barge was filling rapidly with a fluid heavier than water,—molasses,—which would have tended to sink the barge quite as readily as any intake of water; and, in the absence of any proof of defective condition or leakage before the sinking, there was no basis for the Court to infer that the barge sank by reason of an unproven intake of water, rather than by reason of the proven intake of molasses.

The net result of the uncontradicted evidence in the case was to show as persuasively as could be expected or required in a case of this type that the barge sank by reason of the overfilling of her stern tanks. As his opinion clearly indicates (R. 253-258), the trial judge thought that he could not accept the proofs of the overfilling of the stern tanks so long as he was unable to make the factors of time, flow, and weight, tally with arithmetical precision. Your respondent respectfully submits that the law does not require any such degree of precision in the proofs of a case of this type, where, for obvious reasons, no such precision is possible.

The mate of the barge did not pay any attention to the exact time of shifting the flow from the forward to the stern tanks, and when the trial judge was unable to fit his estimate of "11.00 to 11.30" into the arithmetic of the case, the fair conclusion was that the estimate of time was wrong. But the fact was proven without contradiction that after the forward tanks had been only partly filled, the balance of the molasses was pumped into the stern tanks up to the moment of disaster. Whether the forward tanks were loaded down to the 2' freeboard which the mate described, or whether they were loaded to a freeboard of only 12", the balance of the molasses pumped into the stern tanks was

more than sufficient to sink the barge by the stern (R. 150-151; 244-246).

Respondent believes that the foregoing points all have a direct or indirect bearing upon the questions decided by the lower courts. Inasmuch as an appeal in admiralty is a trial *de novo*, this Court may review the case to the extent that it deems necessary in the interests of justice. It may particularly give its consideration to errors of the trial court, correction of which would tend to sustain the decree appealed from. *Lagnes* v. *Greene*, 282 U. S. 531, 538, 539.

CONCLUSION.

THE DECREES OF THE LOWER COURTS SHOULD BE AFFIRMED.

Respectfully submitted,

ROBERT S. ERSKINE,
CLETUS KEATING,
L. DE GROVE POTTER,
RICHARD SULLIVAN,
Counsel for Respondent.

New York, N. Y.,
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